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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-979

IRVING J. THORNE,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N. Y. 10038

GEORGE G. KILARJIAN
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

IRVING J. THORNE,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims in the above case.

Opinions Below

The decision of the Court of Claims dismissing the petition herein is printed in the appendix hereto.

Jurisdiction

Judgment of the Court of Claims dismissing petition was entered October 16, 1972.

The jurisdiction of this Court is invoked under Title 28 U.S.C.A. Sec. 1255.

Question Presented

Is a veteran time barred from asserting a claim for total disability upon *de novo* evidence where his service-connected disability was not revealed until well after he was separated; but was wrongly diagnosed?

Statement of the Case

The petitioner is a medical doctor duly licensed to practice medicine in the State of New York, and enlisted in the active Naval Service of the United States on July 17, 1942.

On July 27, 1943 the petitioner was released from active naval service by reason of a finding by a medical board of a bilateral hernia, a mild left sacroiliac strain, and rheumatic myositis of the lumbosacral regions with fibrotic nodules within the muscles and beneath the fascia.

Petitioner suffered the aforesaid injuries while in the naval service; and, on December 29, 1943 his injuries were determined to be service-connected, though not pensionable by the Board of Veterans' Appeals.

A further application made on October 16, 1944 was denied on November 20, 1944; but, on further medical evidence presented August 27, 1945 the said Board determined that the injuries were compensable at a 20% rate.

Subsequently as a result of a worsening condition, the evaluation was revised upwards to 40% in 1947.

Plaintiff's condition has further worsened and presently is the basis of a claim for pension at a 100% disability rating; based on present medical proof which petitioner has sought to offer.

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The Court below has disallowed his claim as being time-barred, contrary to the authorities recited by the Court in previous and subsequent cases which hold that the statute of limitations is tolled where as here, the Board's decision is tentative and invites reopening as recited in *Friedman* v. *United States,* 310 F.2d 381 (1962) (p. 396 par. (c)).

Obviously the petitioner's claim cannot be time-barred, upon the aforesaid authority relied upon by the court below insofar as the action of the Medical Corrections Board herein in first denying, then allowing and thereafter revising upwards the petitioner's disability rating indicates and conclusively establishes that the board's decision has been tentative in improperly evaluating petitioner's disability status.

On this basis petitioner urges this honorable Court to review the decision of the Court of Claims which summarily dismissed your petitioner's rightful claim to 100% total disability veterans pension payments.

REASONS FOR GRANTING WRIT

1. The decision of the Court below is in conflict with decision of Court of Claims in *Versaci* v. *United States,* 403 F.2d 246 (1968); *Merson* v. *United States,* 401 F.2d 184 and *Beckham* v. *United States,* 392 F.2d 619, which held that the Court may take account of *de novo* evidence as to claimant's physical condition at time of release and thereafter in consideration of his disability claims.

2. The decision of the Court below is in conflict with decisions of the Court of Claims that a serviceman does not waive his claim for failure to apply for total disability

before his release from active duty. *Harper* v. *United States,* 310 F.2d 405 (1962); *Farrar* v. *United States,* 358 F.2d 965 (1965); *Grubin* v. *United States,* 166 Ct. Cl. 272, 333 F.2d 861 (1964) and *Woodward* v. *United States,* 167 Ct. Cl. 306 (1964); and that the claim is not time-barred by reason thereof.

3. The decision of the Court below is inconsistent with its decision in the case of *Friedman* v. *United States,* 310 F.2d 381, cited as a basis for denial of the petitioner's claim herein; where it was held that action by a corrections board is not final and the statute of limitations is therefore tolled where, as in this case, the petitioner is misled and, the correction board's decision is tentative and invites reopening.

The petitioner herein offered proof of his total disability and the Court below has erroneously denied his right to claim his pension by holding that it is time-barred.

ARGUMENT

The Court below erroneously held that petitioner was barred from proceeding with his law suit and his petition was dismissed on the authority of 28 U.S.C.A. §2501 of the Statute of Limitations.

The Court cited but one decision, *Friedman* v. *United States, supra,* as authority for its holding against the petitioner.

There is a very clear and distinct conflict between the holding by the Court below and the holding in the *Friedman* case, *supra.*

This is not the only conflict. As will be briefly pointed out hereafter, there is also a conflict between the holding by the Court below in the instant case and the holdings in the cases both before and after the *Friedman* case, *supra,* decided November 7, 1962, in the following cases:

Versaci v. *United States,* 403 F.2d 246 (1968);
Merson v. *United States,* 401 F.2d 184 (1968);
Beckham v. *United States,* 392 F.2d 619 (1968);
Harper v. *United States,* 310 F.2d 405 (1962);
Farrar v. *United States,* 358 F.2d 965 (1965);
Grubin v. *United States,* 166 Ct. Cl. 272, 333 F.2d 861 (1964);
Woodward v. *United States,* 167 Ct. Cl. 306 (1964).

In all of the aforesaid cases, the Court held that an issue of fact was present which required factual determination as to whether or not the Statute of Limitations, 28 U.S.C.A. §2501, barred the action; whereas the Court below errone-

ously did not consider the factual issues and the extenuating circumstances presented but relied only on the limitation period.

In *Harper* v. *United States, supra,* the Court answered the question of time-bar in the negative; where the facts showed that Harper was separated from service in 1944 and suit was not instituted until 1959; the Court holding:

P. 407 [4]

"But the progressive deterioration of his condition after his return to civilian life and the discovery, in 1956, of a herniated disc showed that, in fact the true nature of his incapacity in 1944 was much more serious than a sprain or strain, and that the previous diagnoses were incorrect."

The record in this case clearly demonstrates that the diagnosis originally made by the medical board was incorrect, insofar as it was revised time and time again; and, petitioner presently finds himself permanently disabled as recited and his claim disallowed by reason of the errors of the Medical Corrections Board.

In *Farrar* v. *United States, supra,* Farrar was separated from service with disabilities wrongly attributed to other causes.

Farrar had suffered a herniated disc while in service, but a disc injury was not diagnosed until well after he was separated from service; as in the instant case. Just as petitioner herein, Farrar's symptoms were erroneously considered temporary and not disabling by the Medical Board; but, the Court held that (a) if the true facts of plaintiff's service-incurred condition (a ruptured disc of the cervical

spine) had been known at the time of his separation from the Army in 1945, he would have been entitled to disability retirement under the pertinent Army regulations; and (b) that the Board for the Correction of Military Records was arbitrary and unsupported by substantial evidence in refusing to grant plaintiff such entitlement on the basis of the materials he presented to that Board.

The *Grubin* case, *supra,* and the *Woodward* case, *supra,* all support this view.

The *Grubin* case, *supra,* is authority for the holding that one who maintained a successful suit for disability retirement pay was entitled to recover such from the time of his release from active duty.

Grubin had left active service in 1946 and brought his action in 1960, the Government claiming he was far out of time.

The Court said at page 862 [1, 2]:

> ". . . We have repeatedly held, however, that a cause of action for disability retirement pay does not accrue on the claimant's discharge; it does not ripen until he has had a competent board (or unsuccessfully sought one)."

On page 863, the Court in reviewing the factual situation in the delay involved in filing suit stated:

> "Plaintiff erred in thinking that his illness, whatever it was, was sufficiently moderate and controllable that he could return to his life as a surgeon; the fact is, as shown in finding 15, that he was soon forced to give up surgery and, then, general practice, and to become a

pathologist so that he could minimize stresses and regulate his activities, diet, and rest periods. The Army doctors were likewise mistaken in thinking that plaintiff's colitis was moderate and improving; the truth, as it now appears, was that the disease was merely quiescent toward the end of his service and flared up at frequent intervals thereafter."

The Court went on to hold that the Correction Board acted unlawfully, arbitrarily, or without substantial evidentiary support when it determined that insufficient material had been presented to indicate probable material error or injustice to plaintiff's case.

Because the present case is very much in point with Grubin's problem and petitioner is also a surgeon who is now faced with the problem of giving up his surgical practice, there should not and cannot be any time-bar to his claim for permanent 100% disability pay.

In the case of *Merson, supra,* the Court held at page 189 [2, 3]:

"Most recently, in the case of Brown v. United States, Ct. Cl. 396 F.2d 989, decided June 14, 1968, we held that in reviewing administrative service decisions, including those of Correction Boards as to 'substantial evidence' on military disability retirement pay cases, this court is not limited to the administrative record, and may take account of *de novo* evidence as to claimant's physical condition at the time of release and thereafter." (Emphasis supplied.)

To the same effect is the holding of the Court below in the *Versaci* and *Beckham* cases, *supra.*

CONCLUSION

In the interests of justice and to maintain the uniformity of the law respecting the petitioner's rights herein, it is respectfully prayed that this Honorable Court grant the petition herein.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner

GEORGE G. KILARJIAN
Of Counsel

Complaint

IN THE

UNITED STATES COURT OF CLAIMS

No. .....

IRVING J. THORNE, 141 East 56th Street,
New York City, N. Y.,

Plaintiff,

—vs.—

THE UNITED STATES,

Defendant.

1. Plaintiff is a resident of the State of New York, and invokes the jurisdiction of this Court under Section 1491 of the Judicial Code and Judiciary Title 28 U.S.C. Section 1491, and all other applicable Federal laws.

2. That since his graduation from the Harvard Medical School in June of 1934, the plaintiff has been licensed to practice medicine in the State of New York.

3. On July 17th, 1942, at Norfolk, Virginia, at the age of 35 years, the plaintiff enlisted in the capacity of Surgeon in the Medical Corp. in the active Naval service of the United States. On July 27, 1943, the plaintiff was released from active Naval duty as a result of the findings by a Board of Medical Survey, of physical disabilities diagnosed as bilateral hernia, a mild left sacroiliac strain, and rheumatic myositis of the lumbosacral regions with fibrotic nodules within the muscles and beneath the facia.

4. That while plaintiff was on active duty at the United States Naval Air Station in Pensacola, Florida in December of 1942, he suffered the aforesaid injuries in the service of the defendant.

5. That on December 29, 1943, due to persistent painful limitations of the professional activities engaged in by the plaintiff, an application was made for compensation for the disabilities herein, following which it was held, after a hearing by the Board of Veterans' Appeals, that plaintiff's physical condition was not disabling to a pensionable degree, although it was definitely established that it was service connected.

6. After a further application by plaintiff made on October 16, 1944, was denied by the Board on November 20, 1944, plaintiff by communication dated August 27, 1945, presented additional medical proof and evidence upon which the Board held that the findings of disability were sufficient to allow the assignment of a compensable evaluation for plaintiff's back condition warranting a rating of twenty per cent (20%).

7. Subsequently, due to the worsening of the plaintiff's disability regarding his back condition, the Board ruled that additional findings of disability were sufficient to allow assignment of compensable evaluation for a rating of forty per cent (40%) in 1947, after it was disclosed that the plaintiff was suffering from a ruptured disc, which classified the plaintiff NFE (no future evaluation) as permanently disabled.

8. That plaintiff is permanently disabled, as affirmatively reflected by the defendant's medical records and by

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the additional evidence and proof of disability submitted by the plaintiff to the defendant.

9. That although plaintiff has sought repeatedly by timely applications to the defendant, to offer proof, testimony and positive evidence that plaintiff is entitled to a compensable and allowable rating of one hundred percent disability, the defendant has, without evidentiary support, arbitrarily and capriciously rejected all of plaintiff's said applications, communications and appeals in this respect, contrary to the clear facts relating to plaintiff's condition, as established by defendant's own medical records and previous errors, and plaintiff has been unlawfully foreclosed from and deprived of his rights to establish, by competent material, medical evidence, proof and testimony that defendant has compounded and duplicated its previous error (as shown by the records) in evaluating plaintiff's compensable and allowable rating of the percentage of disability, which has resulted in substantial damages and injustice to the plaintiff.

10. That plaintiff's physical condition has resulted in plaintiff's one hundred percent (100%) disability as a result of his service on defendant's behalf, and plaintiff is entitled to offer proof that defendant erroneously classified and evaluated his disability on a forty percent (40%) allowable basis for compensation.

11. That plaintiff, under the law, is entitled to an award based on a rating of one hundred percent disability compensation allowable from the time he was separated from the Naval Service of the United States on August 25, 1943, at Washington, D.C. to the date of judgment.

12. That plaintiff's capacity for the pursuit of his professional career, and for other gainful civilian pursuit or occupation, has been so severely impaired that plaintiff cannot earn a decent livelihood commensurate with his academic, mental and professional attainments prior to his enlistment, and the injuries sustained therein in the service, employment and support of the defendant, as more particularly set forth in the report of Dr. John T. Croft, dated November 17, 1971, as follows:

"Following is my report of the orthopedic condition of the above captioned patient who has been under my care since September 23, 1969. His records from the U.S. Navy and the Veterans' Administration have been carefully studied and reviewed. Based on these records, as well as my own physical examination of August 24, 1971, I wish to state the following:

Dr. Thorne is suffering from a herniated intervertebral disc in the lower lumbar region, with nerve root involvement causing referred pain down his legs, mainly his left. Since January 5, 1971 his condition has worsened causing the patient to restrict his physical activities especially his ability to stand at the operating table for long periods of time. It is my opinion that the patient developed this condition while serving in the U.S. Naval Medical Corps during flight training at the U.S. Naval Air Station, Pensacola, Florida, when he lifted heavy crates of furniture. Immediately after lifting the furniture he developed low back pain and bilateral inguinal herniae. The doctors in the U.S. Navy failed to consider his back complaints as arising from a herniated disc because of the masking of the

clinical symptoms at that time. After the patient's examination by the doctors of the Veterans' Administration and it is my opinion that the patient's present back disc and it was concluded that it was connected with his military service as noted above.

I agree with the diagnosis of the Veterans' Administration and it is my opinion that the patient's present bask condition is causally related to the trauma sustained at the time of his tour of duty. Under the circumstances, it is my recommendation that he diminish his physical activities as much as possible and seek activity with a minimum of physical exertion. I have also advised Dr. Thorne to wear a well-fitting support for his back and take medication as necessary to relieve his pain. This condition is permanently disabling and will continue to be progressive. He should be under continued periodical medical observation."

13. This action is timely brought within the statutory period provided therefor by reason of the fact that the complaint sets forth substantial "de novo" evidence as to claimant's physical condition at the time of his release from government service and thereafter, and the circumstances herein are unusual as to the newly discovered evidence establishing in retrospect the error in evaluation of the Corrections Board involved herein, and other agencies of the defendant, as revealed by the passage of time and other and additional competent medical authorities introduced on behalf of the plaintiff.

WHEREFORE, plaintiff prays for judgment against defendant for monthly disability retirement pay from August

25, 1943, on the basis of a disability rating of one hundred percent (100%) under the Veterans Administration Schedule for Rating Disabilities, and for such other and further relief as may be appropriate.

Dated: New York, N. Y.
December 7, 1971.

IRVING J. THORNE

[Verification omitted in printing.]

Defendant's Motion for Summary Judgment

IN THE

UNITED STATES COURT OF CLAIMS

No. 877-71

IRVING J. THORNE,

Plaintiff,

—v.—

THE UNITED STATES,

Defendant.

Defendant moves the Court for summary judgment dismissing the petition on the grounds that plaintiff's claim is barred by the statute of limitations and fails to state a claim within the jurisdiction of the Court of Claims. In support thereof, defendant relies upon the allegations of the petition and the brief with exhibits attached thereto which accompany this motion.

Defendant's Brief

NATURE OF THE CASE

Plaintiff seeks monthly disability retirement pay from August 25, 1943, the date of his discharge from the United States Naval Reserve, to the date of judgment in this action on the basis of a disability rating of one hundred percent (100%) under the Veterans Administration Schedule for Rating Disabilities.

Questions Presented

1. Whether plaintiff's claim for monthly disability retirement pay is barred by the statute of limitations.

2. Whether the granting of disability compensation by the Veterans Administration as alleged establishes plaintiff's eligibility to receive disability retirement pay from the United States Navy.

Statute Involved

Title 28 U.S.C. §2501 (1970) provides in part:

> §2501. Time for filing suit.
>
> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

• • •

Statement of Facts

The following facts alleged in the petition are admitted solely for the purpose of this motion.

On July 17, 1942, plaintiff enlisted in the Medical Corps, United States Naval Reserve, and served on active duty until July 27, 1943, when he was released from active duty as a result of findings by a board of medical survey that he suffered certain physical disabilities. (Pet., para. 3.) Plaintiff was honorably discharged from the Naval Service on August 25, 1943 (Pet., para. 11), after refusing to submit to surgical treatment for correction of an existing physical condition which left him physically disqualified for active duty. (Ex. 1.)

On December 29, 1943, plaintiff applied to the Veterans Administration for disability compensation but his application was denied for the reason that his physical condition was not disability to a pensionable degree. A further application made by the plaintiff on October 16, 1944, was denied November 20, 1944. Upon presentation of additional medical proof on August 27, 1945, plaintiff was awarded a twenty percent (20%) disability rating by the Veterans Administration. (Pet., para. 6.) Subsequently, in 1947, plaintiff was rated forty percent (40%) disabled. (Pet., para. 7.)

On May 29, 1946, plaintiff was authorized to appear before a Naval Medical Survey Review Board convened at the Navy Department, Washington, D. C., which reviewed plaintiff's record and recommended that he not be authorized to appear before a Naval Retiring Board. This recommendation was approved by the President on September 25, 1946. Plaintiff was so informed by letter dated November 15, 1946. (Ex. 2.)

On November 28, 1955, the Board for Correction of Naval Records denied plaintiff relief on his application to correct his service record to show retirement by reason of physical disability, after review of the action of the Naval Medical Survey Review Board on May 29, 1946. (Ex. 3.) It is assumed the Board for Correction of Naval Records is the "Corrections Board involved herein". (Pet., para. 13.)

Plaintiff filed his petition in the Court of Claims on December 29, 1971.

ARGUMENT

I.

Plaintiff's Claim for Monthly Disability Retirement Pay Is Barred by the Statute of Limitations.

The leading case concerning the statute of limitations in the area of disability retirement pay cases, *Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962), *cert. denied, sub nom. Lipp* v. *United States*, 373 U.S. 932 (1963), clearly supports defendant's argument that plaintiff's claim is barred by the six-year statute of limitations. In *Friedman*, the court reviewed its decisions on the time-bar in the disability retirement field and reaffirmed that the judicial claim for disability retirement pay accrues "on final action of a board competent to pass upon eligibility for disability retirement (or upon refusal of a request for such a board)." 159 Ct. Cl. at 24, 310 F.2d at 395-96. The court noted that the Retiring Board is normally "the proper board" and that once a final decision is had from the Retiring Board, "the claim accrues, the limitations period begins to run, and *there is no tolling of the statute by reason of further applications to other boards or agencies* (including the Correction Board)." 159 Ct. Cl. at 24, 310 F.2d at 396 (emphasis added). The court stated the refusal to grant a Retiring Board would start the running of the statute of limitations, citing *San Millan* v. *United States*, 139 Ct. Cl. 485 and other applicable cases. 159 Ct. Cl. at 14, 310 F.2d at 387.

Lastly, the court found that a "claim for entitlement to disability retirement status and pay—of the type requiring discretionary action by a board and the Secretary—is

not a 'continuing claim' but accrues as a whole (once it accrues)." 159 Ct. Cl. at 25, 310 F.2d at 396.

Plaintiff's cause of action for disability retirement pay accrued at least by November 15, 1946, the date he was informed by letter that he would not be granted an appearance before a Naval Retiring Board (Ex. 2). *Friedman, supra.* It is well established that any applications plaintiff later made to other boards or agencies do not toll the running of the statute of limitations. *Friedman, supra; O'Callahan* v. *United States,* No. 399-69 (decided December 10, 1971).

As plaintiff did not file his petition in this court until December 29, 1971, more than twenty-five years after the accrual of his cause of action for disability retirement pay, his claim is obviously barred by the six-year statute of limitations, 28 U.S.C. §2501 (1970).

II.

The Granting of Disability Compensation by the Veterans Administration Does Not Establish Eligibility to Receive Retired Disability Pay From One of the Armed Forces.

The court has many times held that the action taken by the Veterans Administration in granting disability compensation is not binding upon and does not establish eligibility to receive retired disability pay from one of the armed forces because the same laws are not involved. *Mueller* v. *United States,* 188 Ct. Cl. 1158 (1969); *Williams* v. *United States,* 186 Ct. Cl. 611, 405 F.2d 890, *cert. denied,* 396 U.S. 966 (1969); *Johnson* v. *United States,* 138 Ct. Cl. 81, 149 F. Supp. 648, *cert. denied,* 355 U.S. 850 (1957). and cases

cited therein. Therefore, the fact that the Veterans Administration allegedly found plaintiff entitled to disability compensation is not binding on the Navy, which operates under separate statutory authority, and does not entitle plaintiff to disability retirement pay.

Conclusion

Plaintiff's claim alleged in the petition is not within the jurisdiction of the Court of Claims because the claim is barred by the statute of limitations. For the reasons stated herein, defendant's motion for summary judgment should be granted and plaintiff's petition dismissed.

Respectfully submitted,

L. Patrick Gray, III
Assistant Attorney General
Civil Division

Mark R. Wiener
Attorney, Civil Division
Department of Justice

Exhibit 1

Prep. 7-10-43
Pers-3220-jg
172752

July 12, 1943

From: The Chief of Naval Personnel.

To: Lieutenant Irving J. Thorpe, MC-V(S), USNR., Bethesda, Maryland.

Via: The Medical Officer in Command.

Subject: Action upon report of Board of Medical Survey.

1. In view of your refusal to submit to surgery which might remove your physical disqualification, retiring board proceedings will not be instituted. You will be released from active duty and subsequently discharged from the Naval service.

2. Immediate acknowledgment of receipt of this letter is requested.

Exhibit 2

178768
Pers-325-res
Prep. 11-14-46

15 Nov 1946

To: Mr-Lieutenant Irving James Thorne,
Medical Corps, U. S. Naval Reserve,
942 1/2 South Indiana Street,
Los Angeles 33, California.

Subj: Action of Naval Medical Survey Review Board.

1. The Naval Medical Survey Review Board which convened in your case on 29 May 1946, at the Navy Department, Washington, D. C., is of the opinion that you are not permanently incapacitated for service; that your present condition is amenable to treatment and does not disqualify you for the performance of useful active duty. The Board therefore does not recommend that you be authorized to appear before a Naval Retiring Board.

2. The President of the United States on 25 September 1946 approved the proceedings, opinion and recommendation of the Naval Medical Survey Review Board.

3. In view of the foregoing, you will not be authorized to appear before a Naval Retiring Board.

4. Please furnish the Disbursing Officer having custody of your pay record two certified copies of this letter.

5. Acknowledgment of receipt is requested.

LOUIS DENFELD
The Chief of Naval Personnel

CC:
File copy
Office copy
Officer's copy
Health Record
Medical Record

Prep. by:
C. W. Moses
Captain, USN,
BuPers.

Finished File Pers 325

Exhibit 3

[EMBLEM]

DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

WASHINGTON 25, D. C.

SMF:hkh

29 November 1955

Irving J. Thorne, M. D.
11 East 65th Street
New York 21, New York

My dear Mr. Thorne:

Reference is made to your application for correction of your naval record, under the provisions of Section 207 of the Legislative Reorganization Act of 1946, as amended (65 Stat. 655).

Administrative regulations and procedures established by the Secretary of the Navy for the guidance of this Board provide that the burden of proof is on a Petitioner to show by documentary evidence that an error has been made, or an injustice has been suffered. Further, a hearing by the Board may be denied when a Petitioner has failed to show that an entry or omission in his naval record was improper or unjust under then existing standards of naval law, administration, and practice.

Preliminary examination of your naval record and review of the material submitted by you fails to establish a sufficient basis for further action by this Board.

It is not the intention of the Board to imply that a subsequent review of your case may not be had. As stated above, however, the burden is on you to show that an error or injustice has occurred.

In the absence of additional material evidence, no further action on your application is contemplated.

Sincerely yours,

F. W. (Illegible)
Assistant
Executive Secretary
By direction of the Chairman

Plaintiff's Opposition Papers to Defendant's Motion for Summary Judgment

IN THE

UNITED STATES COURT OF CLAIMS

No. 877-71

IRVING J. THORNE,

Plaintiff,

—against—

THE UNITED STATES,

Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

IRVING J. THORNE, being duly sworn, deposes and says:

He is the plaintiff in the above entitled action.

Deponent believes he has a good, valid and meritorious cause of action, as more fully set forth in the letter written to the Department of the Navy, Office of the Secretary, Washington, D.C. under date of July 20, 1971, copy of which is annexed hereto and made part hereof as Exhibit B.

Deponent's disabling conditions which, in deponent's opinion, constitute newly discovered evidence are described in

the affidavit by Dr. John T. Croft and Exhibit A, also annexed hereto and made part hereof.

WHEREFORE, deponent respectfully prays for an order denying defendant's motion for summary judgment dismissing plaintiff's petition.

IRVING J. THORNE, M.D.

[Jurat omitted in printing.]

Affidavit of John T. Croft

IN THE

UNITED STATES COURT OF CLAIMS

No. 877-71

IRVING J. THORNE,

Plaintiff,

—against—

THE UNITED STATES,

Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN T. CROFT, being duly sworn deposes and says:

He is a duly licensed physician and surgeon of the State of New York with an office located at 901 Fifth Avenue, New York, N.Y.

Under the date of November 17, 1971, I sent a report to Jacob Rassner, plaintiff's attorney, copy of which is annexed hereto and made part hereof as Exhibit A.

Supplementing my report of November 17, 1971, it is my opinion based on a reasonable degree of medical certainty that the injuries which Dr. Thorne suffered in December, 1942 developed into a herniated disc, which injuries were considered by Navy Medical Survey Review Board on July 18, 1946 who found that the conditions did not disqualify

Dr. Thorne from active duty and that the conditions were amenable to medical treatment.

It was not until January 5, 1971 that plaintiff developed severe back and leg pain, which restricted his physical ability to stand at an operating table.

Deponent examined plaintiff on August 24, 1971 and is of the opinion that these are more severe conditions and although causally related to Dr. Thorne's injury of December, 1942 had not been discovered by the Navy doctors heretofore because the conditions had not manifested themselves to the same extent as they did on January 5, 1971.

These more severe conditions stemming from the original injury did not disable Dr. Thorne in his work as an operating surgeon until January 5, 1971. These conditions have become active and progressive since January 5, 1971, and I have recommended that Dr. Thorne curtail physical exertion as much as possible, especially standing on his feet while performing surgery.

JOHN T. CROFT, M.D.

[Jurat omitted in printing.]

Affidavit of Jacob Rassner

IN THE

UNITED STATES COURT OF CLAIMS

No. 877-71

IRVING J. THORNE,

Plaintiff,

—against—

THE UNITED STATES,

Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JACOB RASSNER, being duly sworn, deposes and says:

That he is an attorney duly admitted to practice law in the State of New York and duly admitted to practice before this Honorable Court.

That he is the attorney for the plaintiff and makes this affidavit in opposition to defendant's motion for summary judgment dismissing the petition.

Defendant has failed to submit any affidavit in support of the motion but relies on holdings in cases which are irrelevant herein.

There is no controversy as to the following:

1. The factual situation, the facts being specifically admitted by the defendant on pages 2, 3 and 4 of its brief.

2. The findings by the Veterans Administration are not binding on the Navy. Plaintiff does not contend that they are.

The findings of the Veterans Administration constitute a factual situation which has not been disputed, and is not urged by the plaintiff as being binding on the Navy. Such findings by the Veterans bureau of doctors support plaintiff's contention of the present newly discovered evidence as being causally related to the original injury.

THE SOLE REMAINING QUESTION IS ONE OF LAW AS TO THE STATUTE OF LIMITATIONS.

Defendant cites authorities as to the applicable statute of limitations but has failed or overlooked the exception to the statute.

It is respectfully submitted that this Honorable Court is never barred from considering newly discovered evidence and correcting erroneous findings.

Conceding for the purposes of this motion that plaintiff's claim first accrued at the time of his original injury, this does not alter the fact that the Navy did not find that his present disability accrued at that time.

It is plaintiff's contention, supported by the exhibits annexed hereto, that irrespective of when his injury occurred, his present disability did not accrue prior to January 5, 1971.

There is no dispute by the defendant that the disability, the subject matter of this litigation, is service connected and first accrued on January 5, 1971. That prior thereto, the Navy doctors found that there was no disabling condition. Accordingly, the present condition constitutes newly discovered evidence. See:

Versaci v. *United States*, 403 F. 2d 246 (1968)
Beckham v. *United States*, 392 F. 2d 619 (1968)
Merson v. *United States*, 401 F. 2d 184 (1968)

WHEREFORE, deponent respectfully submits that defendant's motion which is devoid of any factual support and lacks any legal basis should be denied.

JACOB RASSNER

[Jurat omitted in printing.]

Exhibit "A"

JOHN T. CROFT, M. D.
901 Fifth Avenue
New York, N. Y. 10021

REgent 7-0321

November 17, 1971

Jacob Rassner, Esq.
15 Park Row
New York, New York

Re: Irving J. Thorne

Dear Mr. Rassner:

Following is my report of the orthopedic condition of the above captioned patient who has been under my care since September 23, 1969. His records from the U.S. Navy and the Veterans' Administration have been carefully studied and reviewed. Based on these records, as well as my own physical examination of August 24, 1971, I wish to state the following.

Dr. Thorne is suffering from a herniated intervertebral disc in the lower lumbar region, with nerve root involvement causing referred pain down his legs, mainly his left. Since January 5, 1971 his condition has worsened causing the patient to restrict his physical activities especially his ability to stand at the operating table for long periods of time. It is my opinion that the patient developed this condition while serving in the U.S. Naval Medical Corps during flight training at the U.S. Naval Air Station, Pensacola,

Florida, when he lifted heavy crates of furniture. Immediately after lifting the furniture, he developed low back pain and bilateral inguinal herniae. The doctors in the U.S. Navy failed to consider his back complaints as arising from a herniated disc because of the masking of the clinical symptoms at that time. After the patient's survey from the U.S. Navy, the signs and symptoms became more evident and on examination by the doctors of the Veterans' Administration, he was found to have a herniated intervertebral disc and it was concluded that it was connected with his military service as noted above.

I agree with the diagnosis of the Veterans' Administration and it is my opinion that the patient's present back condition is causally related to the trauma sustained at the time of his tour of duty. Under the circumstances, it is my recommendation that he diminish his physical activities as much as possible and seek activity with a minimum of physical exertion. I have also advised Dr. Thorne to wear a well-fitting back support and take medication as necessary to relieve his pain. This condition is permanently disabling and will continue to be progressive. He should be under continued periodic medical observation.

Very truly yours,

/s/ JOHN T. CROFT
John T. Croft, M.D.

JTC:b

Exhibit "B"

July 20, 1971
Department of the Navy
Office of the Secretary
Washington, D.C. 20350

Re: Irving J. Thorne, M.D. Your File LA-13-clk; 3-609

Dear Sirs:

The subject matter of this letter is reconsideration of the service connected effect of the herniation of intervertebral disc between L-4 and L-5 of Dr. Thorne.

Dr. Thorne was in to see me today and informed me that he was examined by his personal physician, Dr. David H. Smith, for back pains.

The history re Dr. Thorne's claim is as follows:

On July 18, 1946 Dr. Thorne's case was considered by a Navy Medical Survey Review Board which found that he was suffering from lumbo-sacral myositis and from hernia inguinal bilateral. The Board was of the opinion that these conditions were incurred in the line of duty and not as a result of Dr. Thorne's misconduct; that they did not exist prior to his entry into service; that these conditions were not disqualifying for active duty; and, that these conditions were amenable to medical treatment. The Board did not recommend that Dr. Thorne appear before a Naval Retiring Board. It was noted that there were no contra-indications to surgery for the hernia but that Dr. Thorne refused surgery. For this reason it was considered that while he was disabled because he refused surgery he was not unfit

for further service. The President of the United States approved the proceedings and findings in Dr. Thorne's case on February 25, 1946.

A petition for correction of his naval records was presented by Dr. Thorne to the Board of Correction of Naval Records. This Board on November 29, 1955, after a review of the case, advised him that the evidence presented was not sufficient to establish proof of an error or injustice in his case so as to warrant a correction of his records.

Apparently, on July 18, 1946 Dr. Thorne's condition was not as apparent nor the nature and extent of his disability and injury as it is at the present time.

The recent medical examination seems to come within the category of newly discovered evidence justifying having this matter called to the attention of the Board for Correction of Naval Records which, in my opinion, constitutes a legal basis for remedial rights under § 1201 of Title 10, U.S.C. Armed Forces and § 1491, Title 28, Judiciary Code, as well as well settled law as enunciated in the cases of *Versaci* v. *United States,* 403 F. 2d 246 (1968); *Beckham* v. *United States,* 392 F. 2d 619 (1968); *Merson* v. *United States,* 401 F. 2d 184 (1968).

The newly discovered evidence clarifies in retrospect the problem presented in July, 1946 which, in my opinion, merits reconsideration by the Board of Corrections of Naval Records so that Dr. Thorne might receive the benefit of applicable remedial statutes without the need of my presenting his claim in the United States Court of Claims.

May I call upon your indulgence to advise whether Dr. Thorne's claim is one amenable to further consideration by the appropriate provisions of the United States Navy.

Very truly yours,

JACOB RASSNER

JR:A

Order

IN THE

UNITED STATES COURT OF CLAIMS

No. 877-71

IRVING J. THORNE

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges.*

This case comes before the court on defendant's motion, filed February 28, 1972, for summary judgment. Upon consideration thereof, together with the opposition thereto, without oral argument, on the basis of the decision by this court in *Friedman* v. *United States,* 159 Ct. Cl. 1, 310 F.2d 381 (1962), *cert. denied, sub nom. Lipp* v. *United States,* 373 U.S. 932 (1963), it is concluded that plaintiff's alleged claim is barred by the statute of limitations, 28 U.S.C. § 2501, and

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

Chief Judge

OCT 16 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-979

IRVING J. THORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In July 1942, petitioner enlisted in the Naval Reserve. In July 1943, after a board of medical survey found that he had several physical disqualifications, petitioner was released from active duty, and one month later he was honorably discharged. In December 1943 and again the following year, he applied to the Veterans Administration for disability compensation, but his applications were denied. In August 1945, upon presentation of additional medical proof, the Veterans Administration awarded petitioner a 20 percent disability rating, which, in 1947, was increased to 40 percent.

In May 1946, a Naval Medical Survey Review Board recommended that petitioner not be authorized to appear before a Naval Retiring Board. This recommendation was approved by the President, and petitioner was so informed by letter dated November 15, 1946.

In November 1955, the Board for Correction of Naval Records denied petitioner's application to correct his service record to show retirement by reason of physical disability.

In December 1971, 25 years after he was refused a retiring board and 16 years after the adverse decision of the correction board, petitioner filed a petition in the Court of Claims, seeking disability retirement pay based on a 100 percent disability rating from the date of his discharge from the Naval Reserve to the date of judgment in this action. The Court of Claims dismissed the suit as untimely.

2. Petitioner's claim is barred by the relevant six-year statute of limitations. 28 U.S.C. 2501. A claim for disability retirement pay accrues on final action of a board competent to pass upon eligibility for disability retirement, or upon refusal of a request for such a board. *Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F. 2d 381, certiorari denied *sub nom. Lipp* v. *United States*, 373 U.S. 932. Petitioner's claim thus accrued not later than November 15, 1946, when he was refused an appearance before a Naval Retiring Board. His later applications to other boards and agencies did not toll the running of the statute. *Friedman, supra; O'Callahan* v. *United States*, 196 Ct. Cl. 556, 451 F. 2d 1390. Therefore, as the Court of Claims correctly determined, petitioner's claim, filed 25 years after it accrued, was untimely.

The cases relied upon by petitioner are not to the contrary. *Versaci* v. *United States*, 403 F. 2d 246 (Ct. Cl.), *Merson* v. *United States*, 173 Ct. Cl. 92, 401 F. 2d 184, and *Beckham* v. *United States*, 392 F. 2d 619 (Ct. Cl.), deal only with whether the court may consider, in a timely filed petition, new evidence of the claimant's physical condition which was not in the administrative record.

In each of the other cases—*Harper* v. *United States*, 310 F. 2d 405 (Ct. Cl.); *Farrar* v. *United States*, 358 F. 2d 965 (Ct. Cl.); *Grubin* v. *United States*, 166 Ct. Cl. 272, 333 F. 2d 861; *Woodard* v. *United States*, 167 Ct. Cl. 306—the claimant had not requested nor been denied an appearance before a retiring board, and the claim had been filed within six years of the decision of the correction board, the first competent board to rule on the alleged disability. Petitioner, by contrast, was denied a retiring board in 1946, and his claim accrued at that time. Moreover, even if the statute did not commence running until the correction board's decision in 1955, petitioner's claim was still untimely because it was not filed until 16 years after that decision.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-979

IRVING J. THORNE,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent chooses to ignore the question presented and bases its opposition on the glib comment that "The cases relied upon by petitioner are not to the contrary."

This passes the burden to this Honorable Court to consider the holdings in the cases questioned by respondent.

In the case of *Versaci v. United States*, 403 F.2d 246 (Ct. Cl.), the Court reversed the decisions of the Correction Board and the Secretary of the Army on the ground that they were incorrect and against the weight of evidence respecting the extent of his disability relative to his retirement disability allowance.

In the case of *Merson v. United States*, 173 Ct. Cl. 92, 401 F. 2d 184, the United States Court of Claims found judgment for claimant on the ground that he was physically unfit for service when he retired from the service mistakenly as physically fit.

In the case of *Beckham v. United States*, 392 F. 2d 619 (Ct. Cl.), the United States Court of Claims found judgment for plaintiff where an ulcerated duodenum was considered so disabling as to entitle the claimant to disability retirement from the time of his expiration from active duty. The Court further held at page 619:

> "....where there is showing that Board, acting for Secretary, acted arbitrarily, capriciously, without support of substantial evidence and contrary to applicable statutes and regulations, Court has obligation to entertain claim for disability retirement pay. 10 U.S.C.A. § 1201."

As to the cases cited by respondent on page 3 of its brief, when petitioner mentioned these authorities in his petition, he did not do it for the purpose of showing that he had been denied an appearance before the Retirement Board, but to show that petitioner was predicating his claim on disabilities which were ignored or overlooked by the Board, which made an erroneous finding that petitioner's physical condition was not disabling to a pensionable degree and that it is within the province of this Honorable Court to consider whether the Court below committed error in refusing to consider newly discovered evidence always held adequate by other Courts as a basis for reopening a claim.

As to the cases of *Friedman v. United States*, 159 Ct. Cl. 1, 310 F. 2d 381, cert. denied sub nom; *Lipp v. United States*, 373

U.S. 932 and *O'Callahan v. United States*, 196 Ct. Cl. 556, 451 F. 2d 1390, it seems sufficient to call the Court's attention to the following statement on page 396 (c) in the Friedman case, supra:

> "A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality."

The petitioner was misled from the very start, as the record clearly shows, which invited and necessitated reopening of prior tentative and erroneous determinations time and time again to clarify, first, the existence of service connected disability and, thereafter, the nature and extent thereof relative to his disability retirement compensation.

Due to his materially worsening and failing health, never considered, anticipated, or allowed for by the Government relative to petitioner's disability retirement, the Government cannot now be heard to say and must be estopped from asserting that time-bar is a defense; particularly, insofar as the misleading and tentative nature of all the prior decisions herein is plainly delineated in the record.

CONCLUSION

The Court below was in error in relying on respondent's version of the *Friedman* case, supra, which was apparently based on excerpts from the headnotes taken out of context and not representative of but inconsistent with the opinion itself.

The writ sought by petitioner should be granted in the interests of justice, under the circumstances herein.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner